No. 83-812

IN THE

Supreme Court of the United States

October Term, 1983

GEORGE C. WALLACE, ET AL.,
Appellants,

v.

ISHMAEL JAFFREE, ET AL.,
Appellees.

On Appeal from the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN JEWISH CONGRESS ON BEHALF OF ITSELF AND THE NATIONAL JEWISH COMMUNITY RELATIONS ADVISORY COUNCIL, *AMICI CURIAE* IN SUPPORT OF APPELLEES

MARC D. STERN
Counsel of Record
LOIS C. WALDMAN
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

ANDREA KLAUSNER
American Jewish Committee
165 East 56th Street
New York, New York 10022

JUSTIN J. FINGER
JEFFREY P. SINENSKY
RUTI G. TEITEL
JILL L. KAHN
Anti-Defamation League
823 United Nations Plaza
New York, New York 10017

Of Counsel

QUESTION PRESENTED

Whether the Alabama moment-of--silence for prayer or meditation statute violates the Establishment Clause inasmuch as it was enacted with a religious purpose, and it advances, not "accommodates" religion.

TABLE OF CONTENTS

Question Presented i

Table of Contents ii

Table of Authorities iv

Interest of the Amici viii

Summary of Argument xiv

Argument 1

Introduction 1

I. The Historical Record Sustains This Court's Approach To The Establishment Clause 2

A) The Establishment Clause Applies As Against The States 2

B) History Does Not Demonstrate That The Establishment Clause Permits Public Schools To Advance Religion As Part Of Their Educational Program 3

i) Congressional Actions 4

ii) The Absolutist Construction Of The Establishment Clause 6

C) This Court's Summary Affirmance In Wallace v. Jaffree, # 83-812, # 83-929, Disposes Of Appellants' Contentions 9

II. Alabama Acted With A Religious Purpose In Enacting The Moment-Of-Silence For Prayer Or Meditation Statute 10

A) The Affirmed Findings Of Fact Are That Alabama Had A Religious Purpose 11

B) The Existence Of An Impermissible Religious Purpose Is An Adequate Ground For Invalidating A Statute 22

III. Alabama's Moment-Of-Silence For Prayer Or Meditation Statute Tends To Establish -- Not Accommodate -- Religion 27

Conclusion 36

Appendix A

TABLE OF AUTHORITIES

Cases

Bd. of Educ. v. Pico, 102 S.Ct. 2799 (1982) 15

City of Richmond v. U.S., 422 U.S. 358 (1975) 16

Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013 (D. N.M. 1983) 17

Engel v. Vitale, 370 U.S. 421 (1962) 4, 6, 14, 34

Epperson v. Arkansas, 393 U.S. 97 (1968) 23

Everson v. Bd. of Educ., 330 U.S. 1 (1947) 2, 22, 31

Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 10

Larkin v. Grendel's Den, 459 U.S. 116, 103 S.Ct. 505 (1982) 8, 14

Larson v. Valente, 456 U.S. 228 (1982) 11

Lemon v. Kurtzman, 403 U.S. 602 (1971) 8, 10, 12, 22

Lynch v. Donnelly, 104 S.Ct. 1355 (1984) 8, 10, 11, 14, 19, 23, 25, 26, 31, 32

Marsh v. Chambers, 103 S.Ct. 3330 (1983) 4, 6

May v. Cooperman, 572 F. Supp. 1561 (D. N.J. 1983), app. pending, (3rd Cir.) 17

McCollum v. Bd. of Educ., 333 U.S. 203 (1948) xi, 5, 6, 7, 34

McGowan v. Maryland, 366 U.S. 420 (1961) 3, 14, 22

Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 103 S.Ct. 1365 (1983) 16

Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) 25

Mueller v. Allen, 103 S.Ct. 3062 (1983) 8, 30, 33

PEARL v. Regan, 444 U.S. 646 (1980) 27, 28, 29

Pullman-Standard v. Swint, 102 S.Ct. 1781 (1982) 19

Quick Bear v. Leupp, 210 U.S. 50 (1908) 4

Rogers v. Lodge, 102 S.Ct. 3272 (1982) 13, 19

School Dist. of Abington Twshp v. Schempp, 374 U.S. 203 (1963) 3, 4, 6, 8, 14, 22, 24, 27, 28, 29, 34

Sherbert v. Verner, 374 U.S. 398 (1963) 30

Stone v. Graham, 449 U.S. 39 (1980) 6, 12, 23

St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981) 33

Thomas v. Rev. Bd., 450 U.S. 707 (1981) 28, 30

Torcaso v. Watkins, 367 U.S. 488 (1961) 22

Treen v. Karen B., 102 S.Ct. 1267 (1982), aff'g 653 F.2d 897 (5th Cir. 1981) 6, 15

T.W.A. v. Hardison, 432 U.S. 63 (1977) 32

U. S. v. Lee, 102 S.Ct. 1051 (1982) 33

Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252 (1977) 25

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 3, 5, 6, 22 25, 28, 29, 32

Wisconsin v. Yoder, 406 U.S. 205 (1972) 29, 30

Zorach v. Clauson, 343 U.S. 306 (1952) 29

Statutes

F. R. Civ. P. 52(a) 19

Other Authorities

Bailyn, The Ideological Origins of the American Revolution (1967) 7

Binion, "Intent" and Equal Protection: A Reconsideration, 1983 Sup. Ct. Rev. 397 26

Cobb, The Rise of Religious Liberty in America (1902 & photo. reprint 1970) 21

Cord, Separation of Church and State: Historical Fact and Current Fiction (1982) 7

Gianella, Religious Liberty, Non-establishment and Doctrinal Development, 80 Harv. L. Rev. 1381 (1967) and 81 Harv L. Rev. 513 (1968) 28

Kurland, Religion & the Law (1962) 28

Laycock, Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy, 81 Col. L. Rev. 1373 (1981) 28, 31

Levy, Judgements: Essays on American Constitutional History (1972) 7

Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978) 7

Pfeffer, Church, State and Freedom (1967) 5

3 Story, Commentaries on the Constitution, (1833) §1877 (A.107a) 27

INTERESTS OF THE AMICI

The American Jewish Congress is a membership organization of American Jews founded in 1918 to protect the religious, political, and economic rights of Jews and to promote the principles of democracy. It is committed to the preservation of the freedoms secured by the First Amendment and especially the freedoms secured by its Establishment and Free Exercise Clauses, particularly as these principles apply to the nation's public schools.

This brief was prepared by the American Jewish Congress on behalf of the National Jewish Community Relations Advisory Council, consisting of the following national agencies: American Jewish Committee, American Jewish Congress, B'Nai B'rith--Anti-Defamation League, Hadassah, Jewish Labor Committee, Jewish War Veterans of the U.S.A., National Council of Jewish Women, Union of American Hebrew

Congregations, Union of Orthodox Jewish Congregations of America, United Synagogue of America--National Women's League for Conservative Judaism , Women's American ORT, and the 111 Community Member Agencies representing all major Jewish communities in the United States. These communities are listed in Appendix "A".

The Jewish community, through the actions of its representative agencies, has long sought to insure that church and state are kept separate. As a small religious minority in an overwhelmingly Christian country, commitment to the separation principle serves to help maintain the Jewish community's status as political and civic equals in a religiously alien society.

The amici believe that, rather than serving to derogate from the individual and collective exercise of religious liberty, the separation of church and state is an integral and indispensable guardian of that liberty.

At bottom, this case is not about whether one or the other branches of the tripartite test has been violated, or the proper scope of the accommodation doctrine. This case presents, in stark relief, the question of whether it is the business of government to encourage or promote religious observance; or whether, as the amici believe, it is no business of government to serve as an advocate of religion.

The moment-of-silence itself appears to be relatively innocuous. But the role of the State of Alabama as an active advocate and promoter of religion is, in the view of the amici, a serious threat to religion, as well as to religious liberty.

Enlisting religion to advance the state's agenda would not only deprive society of the benefit of religion's independent and often critical voice, but result in the distortion of the mission of the religious entity to conform to the

interests of its official patron.

Nor do the amici, who include almost all representatives of American Judaism, believe that the separation of church and state, particularly in the public schools, constitutes hostility toward religion. Rather, they agree with Justice Frankfurter, that

> the secular public school does not imply indifference to the basic role of religion in the life of the people nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered.

McCollum v. Bd. of Educ., 333 U.S. 203, 216 (1948) (concurring opinion).

Finally, the amici believe, based on many years of experience, that a judgment upholding the statute would be widely seen as a green light from this Court for further, more intrusive, governmental measures to encourage religion in the public schools. Moreover, this and other similar statutes will not be enforced by lawyers and judges sensitive to constitutional values, or in a forum where overreactions can be easily corrected, and where the victims of the violation are willing and able to complain. It will be applied by school officials, like those of the State of Alabama, who until enjoined by the Court of Appeals, asserted a right to pray together with their students, notwithstanding this Court's clear pronouncements to the contrary. It will be applied behind the closed doors of classrooms where impressionable children prefer conformity to standing out. For these reasons, as well as

the more legalistic ones suggested below, the amici urge an affirmance.

The brief is filed with the consent of all the parties. The consents have been filed with the Clerk.

SUMMARY OF ARGUMENT

By using its compulsory education system to promote religion, Alabama has unambiguously crossed the Establishment Clause's boundary line between church and state. The sole reason for Alabama's requiring the public school teachers to announce a period of silence for meditation or voluntary prayer at the beginning of each school day is -- as both courts below found -- "to return voluntary prayer in the public schools," and thereby infuse religion into the lives of public school children. Because the sole purpose of the Alabama statute is to encourage religious observance, it is constitutionally infirm.

The statute's unconstitutionality is not vitiated by characterizing it as a governmental effort to accommodate the practice of religion. The essence of the accommodation doctrine, as articulated by this Court over the past twenty years, is

that, in the event of a clash between a citizen's religious practice and a governmental practice, government may, and sometimes must, bend a rule to meet pre-exisitng religious choices of the citizenry. Here, no clash between free exercise and government practice exists. Rather, Alabama is generating a required religious practice which is religious facilitation, not accommodation.

ARGUMENT

INTRODUCTION

This case presents both a narrow and a broad question concerning the proper relationship between the state and its school system on the one hand, and religion on the other. The narrow question is whether Alabama Code §16-1-20.1, authorizing teachers to announce a period of silence for meditation or voluntary prayer at the beginning of each school day, is a law "respecting an establishment of religion."

The broader question is the proper scope of the accommodation doctrine. Put otherwise, the issue in this case is whether government may -- or even must, Brief of George C. Wallace at 30 (hereafter Wallace Brief) -- under the guise of accommodation, use the compulsory education system for "the promotion of religion," Wallace Brief at 36; see also Brief of Appellants Smith, at

19 (hereafter Smith Brief).

Before turning to these issues, it is necessary to briefly discuss appellants' arguments that the Establishment Clause does not apply to the states, that it should not be interpreted to bar public schools from advancing religion as part of their educational program, and that the Court has wrongly adopted an "absolutist position" in interpreting the Clause.

I. The Historical Record Sustains This Court's Approach To The Establishment Clause

A) The Establishment Clause Applies As Against The States

Since this Court held that the Establishment Clause had been 'incorporated' by the Due Process Clause of the Fourteenth Amendment, Everson v. Bd. of Educ., 330 U.S. 1 (1947), no Justice of this Court has ever dissented from that view. Even those Justices who disagreed with the Court's general approach to incorporation agreed

that the Establishment Clause applies to the states, as an aspect of "ordered liberty", guaranteed by the Fourteenth Amendment, McGowan v. Maryland, 336 U.S. 420, 460-61 (1961)(Frankfurter and Harlan, JJ., concurring); Walz v. Tax Comm., 397 U.S. 664, 699 (1970) (Harlan, J., concurring); School Dist. of Abington Twshp. v. Schempp, 374 U.S. 203, 253-65(1963) (Brennan, J., concurring); Id. at 310 (Stewart J., dissenting). The historical evidence cited by the appellants in support of the contention that the Establishment Clause is not a restriction on the states is neither new nor novel. This Court has repeatedly considered and rejected those claims, labelling them "untenable and of value only as academic exercises," School Dist.of Abington Twshp. v. Schempp, supra, 374 U.S. at 217.

(B) History Does Not Demonstrate That The Establishment Clause Permits Public Schools To Advance Religion As Part Of Their Educational Program

i. Congressional Actions

Both the Wallace and Smith appellants urge that a variety of Congressional actions -- notably the adoption of the Northwest Ordinance and the subsidization of missions to the Indians* -- prove that early Congresses (but not the First Congress as was the case in Marsh v. Chambers, 103 S.Ct. 3330 (1983)), did not believe that the Establishment Clause barred public schools from advancing religion by requiring students to read from the Bible or to recite prayers, Wallace Brief at 16-30; Smith Brief at 8-42.

To be sure, history has a role to play in constitutional adjudication, particularly insofar as it sheds light on the intent of the draftsmen, Marsh v. Chambers, supra, 103

---

* Appellants seek to convey the impression that this policy was unknown to this Court when it decided Engel and Schempp. In fact, the pattern of subsidies to the Indian missions was cited to this Court in 1908 in the argument of the Solicitor General in Quick Bear v. Leupp, 210 U.S. 50, 73-4 (1908).

S.Ct. at 3333-35 (1983), but only where there is an unambiguous and consistent historical pattern demonstrating that particular practices were thought to be consistent with the Constitution. Even then, history alone is not controlling for "no one acquires a vested...right in violation of the Constitution by long use, even when that span of time covers an entire national existence and indeed predates it." Walz vs. Tax Comm'n., supra, 397 U.S. at 678.

Religion -- almost always the Protestant religion -- was a part of the curriculum of the nation's public schools for many years. For almost as long, these practices have been the subject of bitter contention, first under state establishment clauses, when the First Amendment was thought inapplicable to the states, see generally, Pfeffer, Church, State and Freedom (1967) at 436-46; and later under the federal constitution soon after incorporation, McCollum v. Bd. of

Educ., 333 U.S. 203 (1947). In the case of religious practices in the schools, then, the evidence falls far short of that which the Court found sufficient in Walz to shed light on the meaning of the Constitution in Walz v. Tax Comm'n., supra, and Marsh v. Chambers, supra, Cf. McCollum v. Bd. of Educ., supra, 333 U.S. at 212-20 (1948) (Frankfurter, J., concurring).

Nor have the early Congressional actions cited by appellants deterred this Court from repeatedly striking down public school religious practices, Treen v. Karen B., 102 S.Ct. 1267 (1982), aff'g, 653 F.2d 897 (5th Cir. 1981); Stone v. Graham, 449 U.S. 39 (1980); School Dist. of Abington Twshp. v. Schempp, supra; Engel v. Vitale, 370 U.S. 421 (1962) They should not do so here.

ii. The Absolutist Contruction Of The Establishment Clause

A second argument urged by appellants is that affirmance would necessarily be based on an adoption of the absolutist no-aid construction of the Establishment Clause urged by scholars such as Leo Pfeffer, and accepted by this Court in cases such as McCollum v. Bd. of Educ., supra, Wallace Briet at 27-37; Smith Brief at 27-28. Citing authorities such as Cord, Separation of Church and State: Historical Fact and Current Fiction (1982); and Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (1978), appellants argue that the Establishment Clause does not prohibit non-discriminatory encouragement of religion.*

* Based on an extensive study of primary sources, Professor Levy concludes that, "a preponderence of the whole evidence indicates that the Supreme Court's interpretation is historically the more accurate one." Levy, Judgments: Essays on American Constitutional History 171 (1972). See also, Bailyn, The Ideological Origins of the American Revolution, 246-272 (1967).

However historians may resolve that question, this Court has consistently held that the Establishment Clause does prohibit non-discriminatory aid to religion, Lemon v. Kurtzman, 403 U.S. 602, 612 (1971); Mueller v. Allen, 103 S.Ct., 3062, 3069 (1983); cf. Lynch v. Donnelly, 104 S.Ct. 1355, 1366 (1984); Larkin v. Grendel's Den, 459 U.S. 116, (1982) The Appellant's arguments in this regard, too, have been dismissed authoritatively as being merely of academic interest", School Dist. of Abington Twshp., supra, 374 U.S. at 217.*

---

* In Lynch v. Donnelly, supra, 104 S.Ct. at 1359, the Chief Justice stated that the Establishment Clause did not compel an absolute separation of church and state. But a reading of his opinion makes clear he meant only that not all contact between church and state was illegal, not that the state could be an advocate of religion as the State of Alabama seeks to be.

C. This Court's Summary Affirmance in Wallace v. Jaffree, #83-812, #83-929, Disposes of Appellants' Contentions

Appellee Jaffree successfully challenged not only Alabama's silent prayer and meditation statute, but a statute prescribing a vocal prayer which could be recited at the beginning of each school day, Alabama Code §16-1-20.2. In this Court, Alabama urged reversal of the judgment on the grounds that the Establishment Clause did not apply to the states, Jurisdictional Statement of George C. Wallace, O.T. 1983, #83-812 at 20-21; Jurisdictional Statement of Douglas T. Smith, O.T. 1983, #83-929 at 13-20, and that the Court has misapplied the Establishment Clause so as to prohibit the public schools from advancing religion as part of its educational program, Jurisdictional Statement of Douglas T. Smith, supra, at 23. This Court summarily affirmed; 104 S.Ct. 1704 (1984).

A summary affirmance has the effect of law as to those "precise issues presented and necessarily decided," Illinois State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 182-83 (1979). Appellants' contentions about the non-incorporation of the Establishment Clause, and that Clause's inapplicability to public school religious exercises were necessarily decided against them by this Court's summary affirmance.

II. Alabama Acted With A Religious Purpose In Enacting The Moment-Of-Silence For Prayer Or Meditation Statute

This Court has enunciated a number of criteria for detecting violations of the Establishment Clause, Lynch v. Donnelly, supra, 104 S.Ct. at 1362. Most notable of these is the tripartite test first enunciated as such in Lemon v. Kurtzman, supra 403 U.S. at 612-13, and restated and applied

most recently in Lynch v. Donnelly, supra.* It is here necessary to consider only one of those criteria.

The very first branch of the tripartite test requires that, to be constitutional, a statute must have a secular purpose. Alabama's moment-of-silence for prayer and meditation statute has no such purpose; on the contrary, its sole purpose is religious.

A. The Affirmed Findings Of Fact Are That Alabama Had A Religious Purpose

The affirmed findings of fact are that the moment-of-silence statute is "a purposeful ... effort to express... governmental advocacy of a particular religious message," Lynch v. Donnelly, supra, 104 S.Ct at 1363,

---

* The other two tests are the historical test shown in Point I-B to be inapplicable here, and the "overt discrimination" test of Larson v. Valente, 456 U.S. 228 (1982). The record contains no evidence that the moment-of-silence for prayer or meditation statute was enforced in a discriminatory manner.

to impressionable school children, Stone v. Graham, supra; Lemon v. Kurtzman, supra.*

The District Court made the following factual finding [Appendix at 71d]:

> The purpose of [Alabama Code §16-1-20.1], as evidenced by its preamble, is to provide for a prayer that may be given in public schools. [The sponsor of the legislation] testified that his purpose in sponsoring §16-1-20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their spiritual heritage of Alabama and of this Country....

The District Court concluded that §16-1-20.1 "is an effort ... to encourage a religious activity." Id. at 71d-72d. These factual findings were affirmed by the Court

---

* The Senate Judiciary Committee recently stated that such moments allow schools to express the "proper, supportive relationship between the State and expressions of religious values" and that the "education of ... American youth ought to appropriately consist of the development of spirtual character, in addition to their mental, physical, cultural and vocational skills," S.Rpt. No. 98-347 at 39 (1984). The report suggested no other secular purpose.

of Appeals, 705 F.2d. 1526, 1535 (11th Cir. 1983)[Appendix at 18a], and under the "two-court" rule should be binding here, Rogers v. Lodge, 102 S.Ct. 3272, 3279 (1982).

Although not explicitly relied on by either court below, the enactment in 1978 of Alabama Code §16-1-20, which requires teachers in the first six grades to announce a moment-of-silence "for meditation" is further evidence that the moment-of-silence for prayer or meditation statute constitutes "governmental advocacy of a ... religious message" -- that students ought to pray at the beginning of each school day. That statute was intended to underscore the desirabilty and necessity for prayer; not just silence, or silence for meditation, but of silence for the purpose of prayer.

The fact that the statute requires the moment-of-silence to take place at the beginning of the school day, at a time usually reserved for ceremonial exercises, also be-

speaks a ceremonial, religious purpose, wholly inconsistent with a secular educational one. By enacting Alabama Code § 16-1-20.1, the state indicated in the most direct of terms that religion was not a matter of indifference to it, and should not be for school children.*

The only relevant difference between this case and Engel v. Vitale, supra, is that in this case students could choose their own prayer. However, students in School Dist. of Abington Twshp. v. Schempp,

---

* Lynch v. Donnelly, supra, 104 S.Ct. at 1363, n.7 rejected the argument that, because the secular purpose served by a creche could be served by less religious means, the creche necessarily had a religious purpose. The Court's rejection of this argument is puzzling. The identical argument was made to, and accepted by, this Court in Larkin v. Grendel's Den, supra, 103 S.Ct. at 510 and in McGowan v. Maryland, supra, 366 U.S. at 449-50. Perhaps all that Lynch means is that the availability of secular alternatives is not dispositive of the question of purpose, but not that the existence of such alternatives is not proof of an improper purpose.

supra, and Treen, v. Karen B., supra, were also free to choose their own prayers, facts which did not change the result in either case.

Moreover, the evil against which the Establishment Clause guards is not that students pray or otherwise engage in personal religious activities in a public school (the suggestion of the United States [Brief at 25] that it is this possibility to which appellee objects is simply frivolous). It is rather that government actively encourages religious observance.

The public schools serve as vehicles for "inculcating fundamental values," including "social, moral, or political" ones. Bd. of Educ. v. Pico, 102 S.Ct. 2799, 2806 (1982). Pointedly absent from this list are religious values. Education in those values is not, under the Constitution, the responsibility of the public schools; it is that of family and church.

It is no answer to these factual findings of a religious purpose to argue, as do the Wallace appellants (Brief at 14), "that the constitutionality of identically worded statutes should not turn on the vagaries of motives from one legislature to another." In another context, this Court forcefully dismissed a similar contention:

> An official action, whether an annexation or otherwise, taken for the purpose of discriminating against Negroes on account of their race has no legitimacy at all under our Constitution....
>
> Annexations animated by such a purpose have no credentials whatsoever; for "[a]cts generally lawful may become unlawful when done to accomplish an unlawful end...."* City of Richmond v. U.S., 422 U.S. 358, 378-79 (1975).

Like governmental acts motivated by racial animus, statutes motivated by sectarian considerations "have no credentials whatsoever."

---

* The use of an illicit purpose to invalidate governmental action is not limited to racial discrimination or establishments of religion. See Minneapolis Star and Tribune Co. v. Minnesota Comm'r of Revenue, 103 S.Ct. 1365 (1983).

The Wallace appellants, who represent the State of Alabama, make only the most cursory effort at demonstrating a secular educational purpose, see, Wallace Brief at 9-10. As best the amici can decipher it, appellant Wallace argues that there is a "self-evident" educative value in silence.

Even if this is appellant's contention, it is unavailing here. First, any secular educational purpose advanced by a moment-of-silence is adequately served by the pre-existing moment-of-silence for meditation statute, Alabama Code §16-1-20. Second, the district courts which have received expert testimony on the educational value of moments-of-silence have found that such statutes in fact fulfill none, May v. Cooperman, 572 F.Supp. 1561, 1570 (D.N.J. 1983), app. pending, (3d Cir.); Duffy v. Las Cruces Public Schools, 557 F. Supp. 1013,1017 (D.N.M.1983). And whatever

educational function a moment-of-silence serves would not be limited to the beginning of the school day (the only time the statute applies). Viewed as motivated by a religious purpose, however, §16-1-20.1 must be understood as encouraging students to begin the day with a religious exercise, so as to infuse their entire day's activities with religious meaning.

Neither the Smith appellants nor the United States as amicus suggest any traditional secular purpose for the invalidated statute. The Smith appellants suggest (Brief at 19) that:

> "..For the men who drafted the first amendment, advancing religion and religious teaching fulfilled a vital secular purpose, establishment of good government."

This is surely not a secular purpose. If advancing religion serves the secular purpose of furthering good government, then any religious requirement serves a secular

purpose. This contention, worthy only of an Alice-in-Wonderland character, is not over-zealous advocacy; it is an accurate reflection of what the State of Alabama intended in enacting Alabama Code §16-1-20.1.

The United States suggests (Brief at 23) that the moment-of-silence for prayer or meditation statute allows students to pray without having to appear "different." That concern is nowhere suggested in the record or by appellant state officials. Since the question of secular purpose is one of fact, Lynch v. Donnelly, supra, 104 S.Ct. at 1363; id. at 1368 (O'Connor, J., concurring) (lower court's findings "clearly erroneous", cf. F.R.Civ.P. 52(a)); Rogers v. Lodge, supra, 102 S.Ct. at 3278; Pullman-Standard v. Swint, 102 S.Ct. 1781, 1789 (1982) (questions of intent are factual matters subject to F.R.Civ.P. 52a), not speculation, this suggestion is entitled to no weight. Moreover, the suggestion that the secular

purpose of the Alabama statute is protection of the religiously observant from embarrassment loses much of its force because the United States (Brief at 27) disparages the feelings of those who are uncomfortable at public religious ceremonies.*

The position of the United States is that the Constitution does not demand neutrality as between religion and non-religion, but only that religious dissenters be tolerated, no matter how great their discomfort. However, religious liberty, not mere toleration, is the Constitution's policy. "Religious liberty asserts the equality of

---

* The United States' expressed concerns [Brief at 23] about students saying grace before lunch or praying in the playground without having to appear 'different', are irrelevant to this case, which involves only a moment-of-silence for prayer or meditation at the beginning of the school day.

all; that in the matters of religion all men are equal before God and the law .... [T]oleration assumes that all are not equal, that one form of religion has a better right ...." Cobb, The Rise of Religious Liberty in America at 8 (1902 & photo reprint 1970).

The United States' "crabbed view" of the Establishment Clause is inconsistent with religious liberty as this Court has nurtured it through the years. It is that liberty which protects the rights of believers and non-believers and guards against religious oppression by "leav[ing] religion on the solid foundation of its own inherent validity, without any connection with temporal authority,"* 4 Elliot, Debate

---

* Of course, this is not to say that public services such as police and fire services cannot be made available to churches. It is to say that churches may not call upon government to exercise its authority to aid religious groups in carrying out their sectarian mission.

in the Several State Conventions on the Adoption of the Federal Constitution 194, 200, cited in Torcaso v. Watkins, 367 U.S. 488, 495-6, n.10 (1961).

The United States' remaining argument is that the moment-of-silence for prayer or meditation statute has as a secular purpose the accommodation of religion, an argument to which we return in Point III.

B) The Existence of an Impermissable Religious Purpose Is An Adequate Ground For Invalidating A Statute

Well before this Court codified the tripartite test in Lemon v. Kurtzman, supra, it held religiously motivated governmental practices unconstitutional, see, e.g., School Dist. of Abington Twnshp. v. Schempp, supra, 374 U.S. at 222; McGowan v. Maryland, supra, 366 U.S. at 449; Everson v. Bd. of Educ., supra, 330 U.S. at 16; cf. Walz v. Tax Comm'n, supra, 397 U.S. at 694

(Harlan, J., concurring). It did so in each case without extended discussion. In Epperson v. Arkansas, 393 U.S. 97 (1968) and Stone v. Graham, supra, this Court invalidated public school religious practices on the sole ground that each had a religious purpose. Again, this Court did not explain this result.

Recently Justice O'Connor suggested a rationale for the invalidation of governmental practices on the ground that they are implemented for religious reasons. After explaining that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community," Lynch v. Donnelly, supra, 104 S.Ct. at 1366 she noted that "endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and a... message to adherents that they are insiders." Government's intent to convey a religious

message highlights the relevance of religion to "one's standing in the political community."

Here, as the courts below found, Alabama's intention was to send a religious message -- that students should pray for Divine guidance at the beginning of their daily school activities. True, Alabama did not mandate that students do so,* but only the most obtuse student could not fail to detect the state's underlying message. What else but a religious message could a first grader make of her teacher's suggestion that she might pray? By sending this message, the State of Alabama, in the person of its schoolteachers, charged with training school children to be good citizens, has telegraphed its belief that religion is a good thing, that good citizens pray, and

---

* Coercion is not an element of an Establishment Clause claim, School Dist. of Abington Twshp. v. Schempp, supra, 374 U.S. at 224, n.9.

that the government is well disposed toward those who pray.*

---

* Alabama Code §16-1-20.1 has a wholly religious purpose. Even if there were some secondary secular purpose, the statute would be unconstitutional. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977), holds that, in mixed motive cases, the test is whether the same result would have been reached absent the impermissible factor. See also, Village of Arlington Heights v. Metropolitan Housing Development, 429 U.S. 252, 270, n.21 (1977). Here, the challenged statute would not have been enacted but for the desire to utilize "the prestige, power and influence of a public institution to bring religion into the lives of [Alabama's] citizens; Walz v. Tax Comm'n, supra. 397 U.S. at 696 (Harlan J., concurring).

In Lynch v. Donnelly, supra, 104 S.Ct. at 1362, Chief Justice Burger suggested that only "statute[s]... motivated wholly by religious considerations" are unconstitutional. His holding was rejected by the four dissenting Justices, 104 S.Ct. at 1372-73 (Brennen, J. dissenting) (test is presence of "pre-eminent secular purpose" or secular purpose which "predominates"), and by Justice O'Connor, Id. at 1368, (test not satisfied "by the mere existence of some secular purpose, however dominated by religious purposes.") Thus, five Justices applied a more stringent standard in Establishment Clause cases than elsewhere.

Democratically elected governments are properly accorded great latitude to legislate. They may act for a wide variety of reasons, some noble, some base, without having their actions invalidated by the judiciary. But when they act with the sole purpose of establishing religion, their acts, without any further showing, cannot stand. Whether because the legislature has considered goals the Constitution has declared to be impermissible bases for governmental action, or because the consideration of illicit goals distorts the decision-making process, see, Binoin, "Intent" and Equal Protection: A Reconsideration, 1983 Sup. Ct. Rev. 397, 403-04, or for the reasons suggested by Justice O'Connor in Lynch v. Donnelly, supra, the resulting action must be invalidated.

III. Alabama's Moment-of-Silence For Prayer Or Meditation Statute Tends to Establish -- Not Accommodate -- Religion

The United States, as amicus, in effect concedes that the Court of Appeals was correct in holding that under the tripartite test, Alabama's moment-of-silence for prayer or meditation statute is unconstitutional. It argues, however, that the court below erred in applying that test to this statute, which it categorizes (Brief at 18) as a governmental "effort[] to accommodate the practice of religion." Application of the tripartite test to "accommodation" statutes, says the United States, would result in the invalidation of all such statutes.* This argument distorts the accommodation doctrine beyond recognition, and effectively reads the Establishment Clause out of the Constitution.

---

* Both the Wallace and Smith appellants make similar submissions, Wallace Brief at 30-33; Smith Brief at 39-42. The Wallace appellants argue that the accommodation doctrine permits "the promotion of religion," Brief at 36, which, as their citation to 3 Story, Commentaries on the Constitution (1833) §1877 (A.107a) makes clear, means for them the promotion of Christianity.

Both this Court,* and academic writers,** have remarked on the fact that the commands of the Establishment and Free Exercise Clauses sometimes point in opposite directions. While the academic commentators have struggled mightily -- and, we think, unsuccessfully -- to rationalize the Court's Free Exercise and Establishment Clause decisions so that they neatly fit under one all-encompassing "doctrine," this Court has

---

* See, e.g., PEARL v. Regan, 444 U.S. 646, 662 (1980); School Dist. of Abington Twshp. v. Schempp, supra, 374 U.S. at 222; Walz v. Tax Comm'n, supra, 397 U.S. at 668-69; Thomas v. Rev. Bd., 450 U.S. 707, 721-22 (1981) (Rehnquist, J., dissenting).

** See, e.g., Laycock, Toward a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Automony, 81 Col. L. Rev. 1373 (1981) (hereafter Laycock, Church Autonomy); Gianella, Religious Liberty, Nonestablishment and Doctrinal Development, 80 Harv. L. Rev. 1381 (1967) and 81 Harv. L. Rev. 513 (1968); Kurland, Religion & the Law (1962)

wisely eschewed such an effort.

This Court has sought a more flexible course which attempts to satisfy the claims of both Constitutional impulses, Walz v. Tax Comm'n, supra; PEARL v. Regan, supra. As this Court has consistently recognized, however, see, e.g., Wisconsin v. Yoder, 406 U.S. 205, 220-21 (1972), flexibility has its limits; the accommodation doctrine could be expanded so far as to trench upon the Establishment Clause. While the government may properly take cognizance of the fact that "we are a religious people," Zorach v. Clauson, 343 U.S. 306, 313 (1952), it may not, even under the guise of 'accommodating' religion, "use the machinery of the State to [encourage its citizens to] practice its religious beliefs," School Dist. of Abington Twshp. v. Schempp, supra, 374 U.S. at 226; Id. 307 (Goldberg, J., concurring.) (Bible reading in public schools, though 'voluntary,' cannot be termed 'accommodation').

The amici do not pretend to be able to lay out a comprehensive rule delineating when accommodation is either permissible or required. We believe, however, that before the accommodation doctrine can ordinarily be invoked, there must be some clash between a religious and governmental (or private) practice. The very phrase 'accommodation' implies as much, See American Heritage Dictionary of the English Language, p.8 (1971). All of this Court's accommodation cases are of this type, see, e.g., Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, supra, U.S. v. Lee, 102 S.Ct. 1051 (1982); Thomas v. Rev. Bd., supra. In each of these cases the government simply bends a rule to meet (accommodate) the pre-existing religious choices of the citizenery. Here, by contrast, there is no pre-existing religious choice, Mueller v. Allen, supra, 103 S.Ct. at 3069. Rather, Alabama is seeking to generate a religious choice where

none existed before.*

The United States argues [Brief at 23-4] that the Establishment Clause does not restrict state action to facilitate religious exercise to situations where, absent such facilitation, free exercise would be impossible or severely burdened. It claims legislatures may favor religion over non-religion if a legislature believes it wise public policy to do so. That claim was rejected by this Court's very first modern Establishment Clause case, Everson v. Bd. of Educ., supra, and consistently since, Lynch

---

* We believe that 'accommodation' as a doctrine is not the proper rubric for those cases involving the asserted right of religious institutions to be free of intrusive government regulation. Those cases which do not necessarily deal with clashes between specific religious principles and governmental practices,are in essence claims for church automony, Laycock, Church Autonomy, supra, and should be dealt with as a separate category.

v. Donnelly, supra. Adoption of this view* would render the Establishment Clause a dead letter and make legislatures the final arbiters of all Establishment claims except, perhaps, in cases involving outright religious coercion.

---

* The amici do not mean to suggest that government may accommodate religion only when compelled to do so by the Free Exercise Clause, Walz v. Tax Comm'n., supra. Government can accommodate religion even where it could assert a compelling interest in not doing so. It can require accommodation in the private workplace Cf. T.W.A. v. Hardison, 432 U.S. 63 (1977) where the First Amendment does not apply. It is to argue that the 'accommodation' doctrine should be confined to those cases where there is conflict between religion and organized society.

The Solicitor cites in support of his contention that government may aid religion even where there is no substantial conflict, U.S. v. Lee, supra, Mueller v. Allen, supra, and St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981). None of these cases even remotely supports his argument. Mueller v. Allen simply holds that the tax deduction at issue there was not an unconstitutional establishment of religion under the tripartite test. The 'accommodation' doctrine was nowhere discussed in that decision. St. Martin decided no constitutional question. U.S. v. Lee held only that the government had a compelling interest in not exempting Lee from certain federal taxes. Lee's claim in that case was not that he could not afford taxes, or that those taxes diverted funds from other religious uses, but that the very act of paying social security taxes violated his religious principles. Surely, that is a

sufficient conflict to require accommodation in the absence of a contravening compelling governmental interest.

The government argument would label as an accommodation the public voluntary (because of an excusal provision) Bible reading invalidated in Schempp, the 'voluntary' prayer in Engel v. Vitale, supra, as well as on-school premises religious instruction struck down in McCollum.

The challenged statute, as the United States candidly admits, (Brief of the United States at 17), "implicitly presupposes, and thus affirms, the appropriateness of individual contemplative activity and ... leaves no doubt that religious contemplation is as legitimate as other forms of meditation." The message that Alabama Code §16-1-20.1 seeks to convey is that students ought to pray.

Labelling Alabama's moment-of-silence for prayer or meditation statute an 'accommodation' mistakes accommodation for facilitation. Accommodation is fully consistant with "benevolent neutrality" under which the government neither favors nor impedes religious practice. Facilitation of religion is a marked departure from the policy of neutrality embodied in the religion clauses which has served religion and government so well.

In the case at bar, the state of Alabama has done nothing to inhibit prayer by individual students during the school day at any time. Students are also free to pray before and after school. There is no showing that anyone holds a religious belief requiring a state sanctioned prayer at the beginning of the school day. There is, in short, no conflict between the free exercise right to pray and some other neutral governmental practice which must be mediated.

Here the state sets aside a particular time for prayer and uses the authority figure of the teacher to encourage such prayer. That is not accommodation, it is a paradigmatic "law respecting an establishment of religion."

CONCLUSION

For the reasons stated, the judgment should be affirmed.

MARC D. STERN
Counsel-of-Record

Lois C. Waldman
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

APPENDIX

Appendix A

Birmingham Jewish Community Council

Greater Phoenix Jewish Federation

Tucson Anti-Defamation--Community Relations Committee of the Jewish Community Council

Greater Long Beach and West Orange County Jewish Community Federation

Los Angeles Community Relations Committee of Jewish Federation-Council

Oakland Greater East Bay Jewish Community Relations Council

Orange County Jewish Federation

Sacramento Jewish Community Relations Council

San Diego Community Relations Committee of United Jewish Federation

San Francisco Jewish Community Relations Council

Greater San Jose Jewish Community Relations Council

Greater Bridgeport Jewish Federation

Greater Danbury Community Relations Committee of Jewish Federation

Greater Hartford Community Relations Committee of Jewish Federation

New Haven Jewish Federation

Eastern Connecticut Jewish Federation

Greater Norwalk Jewish Federation

Stamford United Jewish Federation

Waterbury Jewish Federation

Jewish Community Relations Council of Connecticut

Wilmington Jewish Federation of Delaware

Greater Washington Jewish Community Council

South Broward Jewish Federation

Greater Fort Lauderdale Jewish Federation

Jacksonville Jewish Community Council

Greater Miami Jewish Federation

Greater Orlando Jewish Federation

Palm Beach County Jewish Federation

Pinellas County Jewish Federation

Sarasota Jewish Federation

Atlanta Jewish Federation

Savannah Jewish Council

Metropolitan Chicago Public Affairs Committee of Jewish United Fund

Peoria Jewish Federation

Springfield Jewish Federation

Indianapolis Jewish Community Relations Council

South Bend Jewish Federation of St. Joseph Valley

Jewish Community Relations Council of Indiana

Greater Des Moines Jewish Federation

Louisville Jewish Community Federation

Greater New Orleans Jewish Federation

Shreveport Jewish Federation

Portland Southern Maine Jewish Federation--Community Council

Baltimore Jewish Community Relations Council

Metropolitan Boston Jewish Community Council

Marblehead North Shore Jewish Federation

Greater New Bedford Jewish Federation

Springfield Jewish Federation

Worcester Jewish Federation

Metropolitan Detroit Jewish Community Council

Flint Jewish Federation

Minneapolis Minnesota and Dakotas Jewish Community Relations Council--Anti-Defamation League

Greater Kansas City Jewish Community Relations Bureau

St. Louis Jewish Community Relations Council

Omaha Jewish Community Relations Committee of Jewish Federation

Atlantic County Federation of Jewish Agencies

Bergen County Jewish Community Relations Council of United Jewish Community

Cherry Hill Jewish Community Relations Council of Southern New Jersey Jewish Federation

Delaware Valley Jewish Federation

East Orange Metropolitan New Jersey Jewish Community Federation

Northern Middlesex County Jewish Federation

Raritan Valley Jewish Federation

Union Central New Jersey Jewish Federation

Wayne North Jersey Jewish Federation

Albuquerque Jewish Community Council

Greater Albany Jewish Federation

Binghamton Jewish Federation of Broome County

Brooklyn Jewish Community Council

Greater Buffalo Jewish Federation

Elmira Community Relations Committee of Jewish Welfare Fund

Greater Kingston Jewish Federation

New York Jewish Community Relations Council

Rochester Jewish Community Federation

Greater Schenectady Jewish Federation

Syracuse Jewish Federation

Utica Jewish Community Council

Akron Jewish Community Federation

Canton Jewish Community Federation

Cincinnati Jewish Community Relations Council

Cleveland Jewish Community Federation

Columbus Community Relations Committee of Jewish Federation

Greater Dayton Community Relations Committee of Jewish Federation

Toledo Community Relations Committee of Jewish Welfare Federation

Youngstown Jewish Community Relations Council of Jewish Federation

Oklahoma City Jewish Community Council

Tulsa Jewish Community Council

Portland Jewish Federation

Allentown Community Relations Committee of Jewish Federation

Erie Jewish Community Council

Greater Philadelphia Jewish Community Relations Council

Pittsburgh Community Relations Committee of United Jewish Federation

Scranton-Lackawanna Jewish Council

Greater Wilkes-Barre Jewish Federation

Providence Community Relations Committee of Rhode Island Jewish Federation

Charleston Jewish Community Relations Committee

Columbia Community Relations Committee of Jewish Welfare Federation

Memphis Jewish Community Relations Council

Nashville and Middle Tennessee Jewish Federation

Austin Jewish Community Council

Greater Dallas Jewish Community Relations Council of Jewish Federation

El Paso Jewish Community Relations Committee

Greater Houston Jewish Federation

Fort Worth Jewish Federation

San Antonio Jewish Community Relations Council of Jewish Federation

Newport News-Hampton Jewish Federation

Richmond Jewish Community Federation

Tidewater United Jewish Federation

Greater Seattle Jewish Federation

Madison Jewish Community Council

Milwaukee Jewish Council